84-125

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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL RHOADES and MILTON BRATEN,

Petitioners,

vs.

ACLI GOVERNMENT SECURITIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL RHOADES AND
MILTON BRATEN
Petitioners Pro Se
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QUESTIONS PRESENTED

1. Did the Second Circuit ignore this Court's many precedents such as Mansfield etc. v. Swan, 111 U.S. 379 (1884), quoted in Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694 (1982), and err by deciding there is Federal jurisdiction over this action in which plaintiff's pleadings alleging "residence" do not allege "citizenship", and plaintiff did not make Federal jurisdiction appear in the pleadings or elsewhere in the record, affirmatively, positively, and clearly, and not by argument, consent or estoppel?

2. Does the Federal jurisdiction statute mean "principal office" or "principal place of doing business" when it deems a corporation is a citizen where it has its "principal place of business"?

3. Does the Second Circuit decision herein conflict with decisions in at

least three other circuits (the Third, Fifth and Sixth) that the phrase "principal place of business" when used in the Federal jurisdiction statute does not mean "principal office"?

4. Can a United States government bond dealer and market maker which does business throughout the United States, make it appear affirmatively, positively and clearly for Federal jurisdiction purposes that its citizenship is diverse from that of its United States customers?

5. Did the Second Circuit err by applying the "not clearly erroneous test" to a finding of jurisdiction based on "contacts" with one state, without considering all pertinent facts?

6. Did the Second Circuit err by affirming a finding of subject matter jurisdiction as "not clearly erroneous", without having findings of fact to aid proper appellate consideration?

7. Is it "the first duty" of this Court to remand this cause with directions to vacate the judgment herein because Federal jurisdiction does not affirmatively appear in the pleadings or elsewhere in the record?

8. Does this Court have the power to decline Federal jurisdiction of this cause without taking Federal court time required to give plaintiff another chance to show that it exists, and thereby refuse to give plaintiff another chance to have another Federal court jury trial, where it appears from the record that plaintiff prevented a full and fair Federal court jury trial of the fact issues herein, by causing the trial court to take questions of fact from the jury, and to decide those questions of fact under the guise of rulings as to questions of law, as to the making of agreements and representations which required that plaintiff actually

have specified bonds during a period in which plaintiff represented that it was charging defendants money to "carry" those bonds as collateral for repayment of money paid out for actual bonds?

9. Should this Court decline Federal court jurisdiction, and refuse plaintiff any further use of the Federal courts for any aspect of this case, and thereby set a precedent which will tend to materially decrease the heavy work load of this Court and the other Federal courts, by discouraging the bringing of actions in Federal courts merely because adversary counsel will not object or will make stipulations without having facts that give an affirmative, clear and positive appearance of Federal court jurisdiction?

THE PARTIES

The parties are named in the caption.

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----------c----------

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Daniel Rhoades and Milton Braten respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this action on March 9, 1984.

Opinions In Lower Courts

The opinion of the Court of Appeals is unreported and is annexed in the Appendix

herewith as Appendix A (A-1 through A-6).

The district court did not render an opinion at the jury trial had herein. The district court's amended judgment is annexed as Appendix C (A-8 to A-12).

The district court filed an unreported post-judgment opinion as to jurisdiction, annexed as Appendix D (A-12 to A-14).

JURISDICTION

The opinion and order of the Court of Appeals was entered on March 9, 1984.

A timely petition for rehearing with a suggestion for rehearing in banc was denied by the Court of Appeals by order filed on April 25, 1984.

This petition for certiorari was timely filed within 90 days of that date.

The Court of Appeals order denying rehearing is annexed as Appendix B (A-7).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This petition for certiorari involves the proper construction of the phrase "principal place of business" which appears in U.S.C. §1332. The pertinent part of that statute provides that:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--

(]) citizens of different States;

* * (2) and (3) * *

* * * * (b) * * * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: * * *.

STATEMENT OF THE CASE

Respondent ACLI Government Securities, Inc. ("ACLI-GS") sued petitioners in the New York Southern District Court and obtained a judgment (A-8).

ACLI-GS's complaint (A-14) alleged that the Federal court had jurisdiction based on citizenship. Petitioners' answers (A-16) denied this.

ACLI-GS's complaint did not allege petitioners' citizenship. It alleged only that each defendant "resides in the State of New York".

ACLI-GS refused to give disclosure as to its total business activity and as to facts pertinent to the issue of jurisdiction. Instead ACLI-GS wrongfully induced petitioners' counsel to stipulate that ACLI-GS's principal office is in Illinois. Neither this stipulation nor any order based thereon was filed.

There was no stipulation as to what the citizenship of the defendants was at the time the action was filed.

There was no stipulation as to where ACLI-GS had its principal place of business at the time the action was filed.

There was no evidence at the trial as to the citizenship of any of the parties.

Respondent did not cause Federal jurisdiction to appear affirmatively in the pleadings or elsewhere in the record.

Respondent relied on argument and claims of consent and estoppel to support its allegation of Federal jurisdiction.

Public records show that respondent is an integral part of an enterprise entity ("ACLI") started prior to 1963.

ACLI has always had its principal place of business in New York (see for example, Banco Do Brasil S.A. v. A. C. Israel Com. Co., 12 N.Y.2d 371 at 374, and Forbes, November 23, 1981, at page 210.

ACLI ("A.C." from A. C. Israel and "L.I." from initials of his cousin Leon Israel) caused ACLI-GS to be incorporated in Delaware, and then qualified to do business in New York and Illinois.

The record herein shows that ACLI-GS sold government securities throughout the United States. Salesmen in New York and Chicago made contacts and agreements for ACLI-GS. ACLI's New York officers then decided how much money to leave in ACLI-GS, and whether ACLI-GS would perform the agreements made by ACLI-GS's salesmen.

The record herein shows that ACLI-GS used ACLI's New York computer, bank facilities, and employees. The record does not show whether contracts were made between ACLI and ACLI-GS to try to maintain corporate identity for ACLI-GS separate from the ACLI enterprise entity.

Public records show that in 1980 and 1981, ACLI lost over $20,000,000.

ACLI-GS then sold over $100,000,000 of securities that it did not have, and obtained money that was used by ACLI.

Public records show that during the same period, companies such as Drysdale Government Securities, Inc. made misrepresentations as to sales of bonds not owned, with resulting criminal prosecutions and convictions.

Public records show that ACLI and ACLI-GS avoided such unpleasantness by selling out to another company (see Forbes, November 23, 1981, at page 210).

The record herein shows that in 1980, ACLI-GS obtained a total of over $1,200,000 from petitioners.

ACLI-GS accomplished this by sending petitioners a number of confirmations to show that petitioners had bought specified bonds from ACLI-GS for "cash".

At the same time ACLI-GS sent petitioners a number of confirmations to

show that ACLI-GS had agreed to supply the "cash" to pay for the "bonds" by "buying back" the "bonds" under so-called "repurchase" agreements.

ACLI-GS sent statements to petitioners in which ACLI-GS represented that ACLI-GS was charging defendants money to "carry" the "bonds" as collateral for repayment of "money" paid out for actual bonds.

At trial herein, petitioners attempted to put in the record the fact that ACLI-GS had no bonds, lent no money, breached its agreements, made misrepresentations to petitioners, and suffered no damage.

The trial judge frustrated this by repeatedly telling the jury ACLI-GS had a legal right to sell bonds it did not own.

The trial judge thereby misled the jury, and under the guise of deciding a question of law, took from the jury the issues of fact as to ACLI-GS's agreements, representations, and intent.

Thereby ACLI-GS succeeded in preventing a full and fair Federal court jury trial of the fact issues herein; obtained dismissal of petitioners' fraud counterclaims; and obtained an "amended judgment" against petitioners requiring them to pay ACLI-GS over $2,000,000.

This was in addition to the more than $1,200,000 the petitioners had already paid out for bonds they never received.

Petitioner Rhoades made a post-trial motion to dismiss for lack of jurisdiction. The trial judge denied the motion without making findings of fact.

Petitioners then appealed to the Second Circuit Court of Appeals.

During the appeal, both petitioners made a motion in the Court of Appeals to dismiss for lack of jurisdiction.

Petitioners cited this Court's decisions. The Court of Appeals ignored them, refused to dismiss, and affirmed.

REASONS FOR GRANTING THE WRIT

Respondent sues for breach of contract. It alleges where petitioners reside. It does not allege what their citizenship was when they were sued.

In Wolfe v. Hartford L. & Annuity Ins. Co., 148 U.S. 389 (1893), this Court said:

> The complaint in this case avers that the plaintiff was at the several times mentioned therein, "and ever since has been and still is, a resident of the city, county and State of New York," but his citizenship is nowhere disclosed by the record.
>
> It is essential in cases where the jurisdiction depends upon the citizenship of the parties that such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. Brown v. Keene, 8 Pet. 112, 115; Continental Ins. Co. v. Rhoads, 119 U.S. 237; Menard v. Goggan, 121 U.S. 253.

In a 1982 decision in Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, this Court discussed the jurisdiction of Federal courts, and the differences between subject matter jurisdiction and in personam jurisdiction.

This Court quoted from this Court's opinion in Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379 (1884). This Court gave reasons why the precedent of Wolfe, supra, and Mansfield, supra, and cases cited in those cases, should still be followed.

In Mansfield, this Court held that in a breach of contract action, there must be diversity of citizenship at the time the action is begun. It must affirmatively appear in the pleadings or elsewhere in the record. This Court further held in Mansfield that its "first duty" was to "take care that neither the Circuit Court nor this court shall use the judicial

power of the United States in a case to which the Constitution and laws of the United States have not extended that power." Likewise in the Insurance Corp. case, supra, this Court held that:

> Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Article 111, §2, cl 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power. Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish". Art 111, §1
>
> Subject matter jurisdiction, then, is an Article 111 as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, California v La Rue, 409 US 109 (1972), principles of estoppel do not apply, American

> Fire & Casualty Co. v. Finn, 341 US 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." Mansfield, Coldwater & Lake Michigan Ry. Co. v Swan, 111 US 379, 382 (1884) (emphasis added).

The lack of Federal jurisdiction in this case results not only from Respondent's failure to allege defendants' citizenship.

The lack of Federal jurisdiction also results from Respondent's failure and inability to show affirmatively, clearly and positively, that its own citizenship was different from that of petitioners, at the time Respondent sued them.

Respondent was able to obtain a stipulation that it has its principal office in Illinois.

Any reliance of the Court of Appeals on this stipulation ignored decisions in at least three other Circuits, that the phrase "principal place of business" does not mean "principal office" when used in the statute permitting Federal court jurisdiction of breach of contract cases where there is diversity of citizenship.

Thus, in Continental Coal Corp. v. Roszelle Bros., 242 F. 243 (1917), the Sixth Circuit noted that "the place where the principal office is located is not necessarily the place where the principal business is carried on."

In Delome v. Union Barge Line Company, 444 F.2d 225 (1971), the Fifth Circuit noted at page 233 that "an allegation that a corporation's home office is located in a certain state is not equivalent to a

declaration that its principal place of business is situated in that state."

In a case in the Third Circuit, Gavin v. Read Corporation, 356 F.Supp. 483 (1973), the court stated that "It is worth noting that the term "principal place of business" does not mean "principal office". The court cited another Third Circuit case as authority for this.

Respondent admits that it is a dealer and market maker in United States government securities and that it has customers throughout the United States.

Under such circumstances, can its principal place of business be found to be in any one state?

If Respondent should claim that its principal activity is in active centers of financial dealings, then New York is the most active of such centers.

There have been no findings of fact herein as to Respondent's activities.

Could the Second Circuit be deemed to have conducted a proper appellate review herein without remanding to the district court for specific findings of fact?

In Croxton v. King's Department Store etc., 449 F.2d 777 (1971), the Fourth Circuit remanded and obtained specific findings of fact, before it affirmed a district court dismissal for lack of diversity jurisdiction.

As shown above, this Court should reverse the Second Circuit because Federal jurisdiction does not appear in the pleadings or elsewhere in the record, affirmatively, positively and clearly, and not by argument, consent or estoppel, as required by this Court's decisions.

This Court should also reverse because the Second Circuit affirmed the district court finding of jurisdiction without having specific findings of fact that could be subjected to appellate review.

It is respectfully submitted that there is a further reason to reverse the Court of Appeals and dismiss this action.

It is respectfully submitted that under the facts and circumstances of this case, including facts which this Court can judicially notice in public records, this Court should not permit amendment of the pleadings. This Court should not allow Respondent a further opportunity to make good its failure to allege and prove that there was Federal court subject matter jurisdiction in this case.

It is respectfully submitted that this Court has the power to decline jurisdiction of a breach of contract action and should do so in this case.

Doing so will save the time of this Court, and will establish a precedent that will tend to materially decrease the heavy work load of this Court and the other Federal courts.

It is respectfully submitted that this Court should discourage the bringing of actions in Federal courts merely because some adversary counsel do not object to defending Federal court cases, and are willing to stipulate as to jurisdiction without having facts necessary for an affirmative, clear and positive appearance of Federal court jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment herein on the face of the record, or a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Petitioners Pro Se
c/o Daniel Rhoades
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Tel. No. (212) 971-0620

APPENDIX

Order of the Second Circuit

(filed March 9, 1984 under Docket Nos. 83-7732, 83-7734,and 83-7950)

UNITED STATES COURT of APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of one thousand nine hundred and eighty four.

Present:

HONORABLE William H. Timbers
Circuit Judge
HONORABLE Richard J. Cardamone
Circuit Judge
HONORABLE Charles H. Tenney*

Circuit Judges,

- -x

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

v.

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

- -x

* United States District Court Judge for the Southern District of New York, sitting by designation.

Daniel Rhoades and Milton Braten, defendants-appellants, appeal from a June 6, 1983 judgment and a July 28, 1983 decision of the United States District Court for the Southern District of New York (Morris E. Lasker, Judge), after a jury trial. The jury found Rhoades and Braten were liable to plaintiff-appellee ACLI Government Securities, Inc. ("ACLI") in the amounts of $1,285,598.28 and $533,930.81, respectively, plus interest. Rhoades also appeals from the district court's October 13, 1983 order denying Rhoades' post-trial, post-judgment motion to dismiss the complaint for lack of subject matter jurisdiction. Rhoades and Braten have each moved this court to dismiss for lack of subject matter jurisdiction. Appellant's attack on the district court's determination that diversity jurisdiction exists turns on whether ACLI is, as it has alleged, a

corporation with its principal place of business in Illinois. If not, the district court was powerless to hear this case against Rhoades and Braten, who are New York residents. In this context, the district court's factual determination that ACLI has its principal place of business in Illinois will be reversed only if clearly erroneous. Village Fair Shopping Center Co. v. Sam Broadhead Trust, 588 F.2d 431, 434 (5th Cir. 1979; Riggs v. Island Creek Coal Co., 542 F2d 339, 342 (6th Cir. 1979). We have reviewed the evidence submitted to the trial court and appelants' facts submitted for the first time on this appeal. In view of the substantial evidence in the record reflecting ACLI's contacts with the State of Illinois, we certainly cannot say the dsitrict court's conclusion was clearly erroneous. Thus, Rhoades' and Braten's motion to dismiss

in this court is denied, and we find the district court properly denied Rhoades' similiar motion in the court below.

Appellants' claims on the merits appear entirely without merit. Rhoades challenges the court's failure to submit to the jury the question of who first breached the agreement. We have reviewed the record and find that Rhoades waived his right to a jury trial on that issue, both explicity and by failing to submit a proposed formulation of that issue before the jury retired, as required by Fed. R. Civ. P. 49(a). Moreover, the district court's formulation of the written questions submitted to the jury was not an abuse of discretion. See Cann v. Ford Motor Co., 658 F. 2d 54, 58 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982).

Rhoades and Braten also claim the trial court incorrectly determined the amount of damages. The district court

properly directed a verdict in favor of ACLI as to amounts of damages. Despite persistent reminders from the court below to do so, appellants failed to submit an alternative theory of damages for submission to the jury. Defendants clearly waived their right to a jury determination of the amounts of damages.

Appellants' last major contention is that ACLI failed to prove its own performance of the agreement by showing it actually purchased bonds for appellants' account and that, as such, ACLI "illegally bet" against its customers. We disagree. The jury determined that the parties entered into ACLI's version of the agreement pursuant to which ACLI was not obligated to actually possess specific bonds until the specific times contemplated for tender. ACLI presented sufficient evidence that the agreement with appellants and the

repurchase agreements used as a financing mechanism were not (as appellants contend) "sham" or "fictitious." Thus appellants' reliance on cases such as Hurd v. Taylor, 181 N.Y. 231 (1905) is misplaced.

We have considered appellants' other contentions and find they were properly submitted to the jury or are without merit. The motion is denied and the judgment is affirmed.

/s/ William H. Timbers
William H. Timbers, U.S.C.J.

/s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

/s/ Charles H. Tenney
Charles H. Tenney, U.S.D.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Order Denying Rehearing
(Filed April 25, 1984)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of April one thousand nine hundred and eighty-four.

(SAME CAPTION AND DOCKET NUMBERS)

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the defendants-appellants, Daniel Rhoades and Milton Braten,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Amended Judgment

Filed June 29, 1983, 81 Civ. 2555 (MEL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff,

-against-

DANIEL RHOADES and MILTON BRATEN,

Defendants.

----------x

WHEREAS, on May 20, 1983 this Court signed a Judgment in this action in favor of plaintiff ACLI Government Securities, Inc. ("AGS") and against defendants Daniel Rhoades and Milton Braten in the amounts of $1,285,598.28 and $533,930.81 respectively, together with interest thereon from April 21, 1981 as provided by law, and with all costs, fees, charges and expenses of this action as taxed by the Clerk of this Court, which Judgment was entered on May 23, 1983 as Judgment Number 83,0859; and

WHEREAS, on May 31, 1983 this Court signed a supplemental Judgment in this action in favor of AGS and against defendants Daniel Rhoades and Milton Braten in the amounts of $1,519,898.50 and $631,106.14 respectively, which amounts include lawfully calculated sums of pre-judgment interest from April 21, 1981 due and owing, together with all costs, fees, charges and expenses of this action as taxed by the Clerk of this Court, which Judgment was entered on June 6, 1983 as Judgment Number 83,0958; and

WHEREAS, entry of the June 6 Judgment Number 83,0958 was intended solely to correct the inadvertent omission of the calculation of pre-judgment interest from April 21, 1981, provided for in the May 23 Judgment Number 83,0859, by setting forth such interest calculations and amounts payable by Daniel Rhoades and Milton Braten; and

WHEREAS, AGS agrees that, if the May 23 Judgment Number 83,0859 is corrected nunc pro tunc to include the calculations and amounts of pre-judgment interest, tnen the June 6 Judgment Number 83,0958 is superfluous;

THEREFORE, pursuant to Fed. R. Civ. P. 60(a), it is

ORDERED, that Judgment Number 83,0859 entered on May 23, 1983 be and hereby is corrected nunc pro tunc to include the lawful calculations and amounts of pre-judgment interest due and owing to AGS and, accordingly, to read as follows:

> This action have duly come on for trial before the Court and a jury, The Honorable Morris E. Lasker, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,
>
> IT IS ORDERED AND ADJUDGED that the plaintiff ACLI Government Securities, Inc. recover of the defendant Daniel Rhoades and sum of $1,285,598.28 with interest thereon from April 21, 1981 as provided by law, in the sum of $234,300.31

(calculated for the period April 21, 1981 - June 24, 1981 at 6 per cent per annum and for the period June 25, 1981 - May 22, 1983 at 9 per cent per annum) for a total amount of $1,519,898.59, together with all costs, fees, charges and expenses of this action as taxed by the Clerk of this Court; and

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff ACLI Government Securities, Inc. recover of the defendant Milton Braten the sum of $533,930.81 with interest thereon from April 21, 1981 as provided by law, in the sum of $97,175.33 (calculated for the period April 21, 1981 -June 24, 1981 at 6 per cent per annum and for the period June 25, 1981 - May 22, 1983 at 9 per cent per annum) for a total amount of $631,106.14, together with all costs, fees, charges and expenses of this action as taxed by the Clerk of this Court; and

IT IS FURTHER ORDERED AND ADJUDGED that defendant Daniel Rhoades' counterclaims against plaintiff ACLI Government Securities, Inc. be dismissed on the merits with prejudice; and

IT IS FURTHER ORDERED AND ADJUDGED that defendant Milton Braten's counterclaims against plaintiff ACLI Government Securities, Inc. be dismissed on the merits with prejudice; and it is

FURTHER ORDERED, that Judgment Number 83,0958 entered June 6, 1983 be and hereby is vacated.

Dated: New York, New York
June 28, 1983

/s/ Morris E. Lasker
United States District Judge

Denial of Post-Judgment Motion

ENDORSEMENT

ACLI GOVERNMENT SECURITIES, INC., Plaintiff v. DANIEL RHOADES and MILTON BRATEN, Defendants. 81 Civ. 2555 (MEL)

LASKER, D.J. In this post-trial, post-judgment motion Daniel Rhoades moves the court to dismiss the complaint on the ground that the alleged diversity jurisdiction does not exist or, in the alternative, to stay enforcement of the judgment pending discovery to establish whether diversity jurisdiction does exist. The motion is denied. Aside from the fact that the joint pre-trial order in this action dated May 18, 1982,

specifically stipulates that the plaintiff's principal office is located in Chicago and that the action is a controversy between citizens of different states, the affidavit of Daniel R. Lenihan in opposition to the motion establishes that the plantiff's Chicago location is its "nerve center" and that Chicago is the place where the plaintiff has "its most extensive contacts with, or greatest impact on, the general public." R. G. Barry Corp. v. Mushroom Makers, Inc., 612 F. 2d. 651, 655 (2d Cir. 1979). Under the rulings of the Court of Appeals of this Circuit, these factors are the criteria for determining where a corporate party maintains its principal place of business and of what state it is a "citizen" within the meaning of Article III of the Consititution and of 28 U.S.C. § 1332. The fact that the plaintiff's parent corporation is located in White

Plains and that two of the plaintiff's traders and officers have at times operated from the parent office in White Plains, is insufficient either to confer New York citizenship upon the plaintiff or deprive it of Illinois citizenship. The motion is denied. It is so ordered.

Dated: New York, New York.
October 13, 1983

/s/ Morris E. Lasker
U.S.D.J.

Allegations as to Jurisdiction

Complaint

Plaintiff, ACLI Government Securities, Inc. ("ACLI"), by its attorneys, Curtis, Mallet-Prevost, Colt & Mosle, as and for its complaint, alleges as follows:

JURISDICTIONAL STATEMENT

1. The jurisdiction of this Court is invoked pursuant to Section 1332 of the

Judicial Code (28 U.S.C. §1332). The amount in controversy exceeds $10,000 exclusive of interest and costs; and the controversy between the above-named plaintiff and defendants is, as hereinafter stated, between citizens of different states.

THE PARTIES

2. Plaintiff ACLI is a Delaware corporation, maintaining its principal place of business at 140 Dearborn Street, Chicago, Illinois. ACLI is a dealer in and market maker of government securities.

3. Upon information and belief, defendant Daniel Rhoades ("Rhoades"), an individual, resides in the State of New York. Rhoades, at all times relevant herein, has been doing and has transacted business in New York.

4. Upon information and belief, defendant Milton Braten ("Braten"), an

individual, resides in the State of New York. Braten, at all times relevant herein, has been doing and has transacted business in New York.

* * * * *

Answer of Daniel Rhoades

Defendant DANIEL RHOADES, by his attorneys, BERNSTEIN & OBSTFELD, P.C., for his answer to the plaintiff's complaint:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1, 2, 14, 15, 20 and 26 of the complaint.

* * * * *

Answer of Milton Braten

Defendant, MILTON BRATEN ("Braten"), by his attorney, RUSKIN, SCHLISSEL,

MOSCOU & EVANS, P.C., as and for his Counterclaim and Answer to the Complaint of ACLI GOVERNMENT SECURITIES, INC. ("ACLI"), alleges as follows:

* * * * *

24. Lacks knowledge or information sufficient to form a belief as to the truth and accuracy of the allegations of paragraphs "1", "2", "14", "15" and "26" of the Complaint.

* * * * *

Office - Supreme Court, U.S.
FILED
AUG 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DANIEL RHOADES and MILTON BRATEN,
Petitioners,

—v.—

ACLI GOVERNMENT SECURITIES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 29, 1984

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BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York correctly hold that subject matter jurisdiction exists in this case pursuant to 28 U.S.C. § 1332 in view of the overwhelming evidence in the record that respondent is a Delaware corporation with its principal place of business in Chicago, Illinois and petitioners are both citizens of the State of New York.

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IN THE

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No. 84-125

DANIEL RHOADES and MILTON BRATEN,

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—v.—

ACLI GOVERNMENT SECURITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent ACLI Government Securities, Inc.[1] ("AGS") respectfully requests that this Court deny the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 9, 1984.

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1 Pursuant to Rule 28.1 of this Court, ACLI Government Securities, Inc. states that it was formerly a wholly owned subsidiary of ACLI International, Inc., which presently is a wholly owned subsidiary of Donaldson, Lufkin & Jenrette, Inc. and is now called Donaldson, Lufkin & Jenrette Commodities, Inc. On April 2, 1984, ACLI Government Securities, Inc. was purchased by Kleinwort, Benson, Inc. and its name was thereafter changed to Kleinwort, Benson Government Securities, Inc.

STATEMENT OF THE CASE

After a four week trial, a jury of the Southern District of New York returned a verdict in favor of AGS. The jury found that petitioners Daniel Rhoades ("Rhoades"), an attorney practicing in New York State, and Milton Braten ("Braten"), a businessman, had breached their contracts with AGS in connection with the purchase and financing of United States government bonds. The Honorable Morris E. Lasker, United States District Judge, entered judgment against Rhoades in the sum of $1,285,598.28 and against Braten in the sum of $533,930.81, together with interest and costs (A 8-12).[2]

Rhoades moved after trial for dismissal based upon an alleged lack of diversity jurisdiction, claiming that AGS' principal place of business was not in Chicago, Illinois, as AGS claimed, but in New York. Rhoades' motion was denied by the district court (A 12-14). Rhoades appealed from this denial, and, in addition, Rhoades and Braten each moved *de novo* before the Court of Appeals for dismissal, arguing again that both they and AGS were citizens of New York at the time this action was commenced (SA 2, 4, 5)[3]. A panel of the Second Circuit Court of Appeals affirmed the district court and denied Rhoades' and Braten's motions (A 1-6). Rhoades' and Braten's subsequent applications for rehearing and rehearing in banc were denied (A 7).

Rhoades and Braten now assert before this Court (1) that AGS' complaint does not adequately allege petitioners' New York State citizenship, and (2) that the Court of Appeals erred in holding that AGS' principal place of business was in Chicago, not in New York, and that therefore AGS was a citizen of the State of Illinois. As demonstrated below, both claims are devoid of merit.

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2 References in the form "A__" are to pages of the Appendix annexed to the petition.

3 References in the form "SA__" are to respondent's annexed Supplemental Appendix.

REASONS FOR DENYING THE WRIT

DIVERSITY OF CITIZENSHIP BETWEEN PETITIONERS AND RESPONDENT IS ESTABLISHED IN THE RECORD

A. Petitioners are and were citizens of the State of New York

For the first time since the inception of this action, Rhoades and Braten claim that the complaint does not adequately allege their New York State citizenship. Although the pleadings in this action do not alone demonstrate petitioners' citizenship, the established fact is that Rhoades and Braten are, and were at the time this action was commenced, citizens of New York State. Failure to adequately allege diversity of citizenship does not defeat federal court jurisdiction where as a matter of fact, as in this case, diversity exists. *Sun Printing & Publishing Ass'n v. Edwards,* 194 U.S. 377 (1904); *Halstead v. Buster,* 119 U.S. 341 (1886); *Continental Life Ins. Co. v. Rhoads,* 119 U.S. 237 (1886).

In their answers to the complaint, Rhoades and Braten did not and indeed could not deny the allegation that they were residents of New York State at the time AGS commenced its action against them (A 14-17). As a result, both Rhoades and Braten have admitted this allegation. Fed. R. Civ. P. 8(d). Such proof of residency is *prima facie* evidence of citizenship, and shifts the burden of showing domicile in a non-diverse state to the party challenging jurisdiction. *See, e.g., Bradley Min. Co. v. Boice,* 194 F.2d 80, 84 (9th Cir. 1951); *Kellean v. Maryland Casualty Co. of Baltimore,* 112 F.2d 940, 943 (10th Cir. 1940), *rev'd on other grounds,* 312 U.S. 377 (1941). Significantly, not only have Rhoades and Braten failed to offer any proof that they were not citizens of the State of New York, they expressly represented to the Second Circuit that they were citizens of New York at the time this action was commenced. This representation was made *inter alia* in Rhoades' affidavit submitted

in support of petitioners' motions *de novo* before the Second Circuit to dismiss this action for lack of subject matter jurisdiction on the grounds that allegedly AGS' principal place of business was also in New York (SA 2, 4, 5).

Since the record establishes the diverse citizenship of the parties, any defect in the pleading of citizenship has been cured. In light of Rhoades' and Braten's admissions that they are citizens of New York, their claim that subject matter jurisdiction is somehow defeated by a "defect" in the complaint is meritless. *Sun Printing and Publishing Ass'n v. Edwards,* 194 U.S. at 382; *see also, Baer v. United Services Automobile Ass'n,* 503 F.2d 393, 397 (2d Cir. 1974).

B. Respondent AGS is and was a citizen of the State of Delaware and of the State of Illinois

With regard to AGS' citizenship, Rhoades and Braten allude to reliance by the Court of Appeals upon a pre-trial stipulation that AGS' principal office is in Illinois (Petition at 14-15), and to the Court of Appeals' supposed equation of "principal office" to "principal place of business" (Petition at i-ii, 3).

Nowhere in its opinion, however, did the Court of Appeals refer to the stipulation or equate "principal office" to "principal place of business." Rather, the Court of Appeals held that Rhoades' and Braten's attack upon subject matter jurisdiction is squarely defeated by the substantial evidence in the record introduced at the trial and appellate levels:

> [Rhoades' and Braten's] attack on the district court's determination that diversity jurisdiction exists turns on whether [AGS] is, as it has alleged, a corporation with its *principal place of business* in Illinois. . . . In this context, the district court's factual determination that [AGS] has its *principal place of business* in Illinois will be reversed only if clearly erroneous. *Village Fair Shopping Center Co. v. Sam Broadhead Trust,* 588 F.2d 431, 434 (5th Cir. 1979); *Riggs v. Island Creek Coal Co.,* 542 F.2d

> 339, 342 (6th Cir. 1979). We have reviewed the evidence submitted to the trial court and [Rhoades' and Braten's] facts submitted for the first time on this appeal. In view of the substantial evidence in the record reflecting [AGS'] contacts with the State of Illinois, we certainly cannot say the district court's conclusion was clearly erroneous. Thus, Rhoades' and Braten's motion to dismiss in this court is denied, and we find the district court properly denied Rhoades' similar motion in the court below.

(A 2-3, emphasis supplied.)

The conclusion of the district court referred to by the Court of Appeals was, more specifically, that the Chicago office of AGS, a corporation organized under the laws of Delaware,

> . . . is its "nerve center" and that Chicago is the place where [AGS] has "its most extensive contacts with, or greatest impact on, the general public." *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979). Under the rulings of the Court of Appeals of this Circuit, these factors are the criteria for determining where a corporate party maintains its *principal place of business* and of what state it is a "citizen" within the meaning of Article III of the Constitution and of 28 U.S.C. § 1332. The fact that [AGS'] parent corporation is located in White Plains [N.Y.] and that two of [AGS'] traders and officers have at times operated from the parent office in White Plains, is insufficient either to confer New York citizenship upon [AGS] or deprive it of Illinois citizenship.

(A 13, emphasis supplied.)

Thus, the argument in the petition that the Court of Appeals and the district court confused "principal office" with "principal place of business," or relied upon the pre-trial stipulation as to AGS' principal office, is totally unfounded.

Petitioners' further claim that "[t]here have been no findings of fact herein as to respondent's activities" (Petition at 15)

ignores the district court's specific findings that AGS' "nerve center" and its public contacts and impact were in Chicago, Illinois. In addition, the Court of Appeals itself reviewed the factual record before the district court, as well as additional facts submitted by petitioners on appeal, and independently concluded that AGS' principal place of business was in Chicago. Thus, petitioners' assertion that the Court of Appeals should have remanded the case for findings of fact is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied. Additionally, because the questions presented by petitioners are spurious and because the petition is frivolous, AGS requests that it be awarded double its costs and reasonable attorneys' fees incurred in opposing the petition. Supreme Court Rule 57.7; *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980).

Respectfully submitted,

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CURTIS, MALLET-PREVOST,
COLT & MOSLE

SCOTT J. MCKAY WOLAS
DANIEL R. LENIHAN
Of Counsel

Dated: August 29, 1984

SUPPLEMENTAL APPENDIX

Excerpted Pertinent Portion of Braten's Notice of Motion to Dismiss Under Fed. R. Civ. P. 12(h)(3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

—against—

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

NOTICE OF MOTION TO DISMISS
UNDER F.R.C.P. 12(h)(3)

MOTION BY: Archibald A. Patterson

APPEARING FOR: Milton Braten

. . .

Brief statement of the relief requested:

Motion to dismiss pursuant to F.R.C.P. 12(h)(3) for lack of subject matter jurisdiction.

. . .

Previous requests for similar relief and disposition:

None.

Statement of issue(s) presented by this motion:

Is there subject matter jurisdiction of [sic] this action against us by reason of diversity of citizenship.

Brief statement of the facts (with page references to the moving papers):

Defendants are citizens of New York.

Plaintiff corporation asserted Illinois citizenship.

Numerous facts show plaintiff's principal place of business is New York.

Summary of the argument (with page references to the moving papers):

Plaintiff has an office in New York;

Plaintiff is controlled from New York;

Banks in New York;

Plaintiff conducts business substantially as controlled division of New York parent corporation;

See Rhoades' Affidavit, *passim.*

Excerpted Pertinent Portion of Rhoades' Notice of Motion to Dismiss Under Fed. R. Civ. P. 12(h)(3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

—against—

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

NOTICE OF MOTION TO DISMISS
UNDER F.R.C.P. 12(h)(3)

MOTION BY: Daniel Rhoades

APPEARING FOR: Pro Se

. . .

Brief statement of the relief requested:

Motion to dismiss pursuant to F.R.C.P. 12(h)(3) for lack of subject matter jurisdiction.

. . .

Previous requests for similar relief and disposition:

Motion in the District Court.

Statement of the issue(s) presented by this motion:

Is there subject matter jurisdiction of [sic] this action against us by reason of diversity of citizenship.

Brief statement of the facts (with page references to the moving papers):

Defendants are citizens of New York.

Plaintiff corporation asserted Illinois citizenship.

Numerous facts show plaintiff's principal place of business is New York.

Summary of the argument (with page references to the moving papers):

Plaintiff has an office in New York;

Plaintiff is controlled from New York;

Banks in New York;

Plaintiff conducts business substantially as controlled division of New York parent corporation.

See Rhoades' Affidavit, *passim*.

Excerpted Pertinent Portion of Rhoades' Affidavit in Support of Motions to Dismiss Under Fed. R. Civ. P. 12(h)(3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ACLI GOVERNMENT SECURITIES, INC.,

Plaintiff-Appellee,

—against—

DANIEL RHOADES and MILTON BRATEN,

Defendants-Appellants.

AFFIDAVIT IN SUPPORT OF MOTIONS TO DISMISS
UNDER F.R.C.P. 12(h)(3)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DANIEL RHOADES, being duly sworn, deposes and says:

1. I am one of two New York citizens sued herein in 1981 for breach of contract. Our answers denied plaintiff's allegation that it was a Delaware corporation with its principal place of business in Illinois. There was an issue whether the United States District Court for the Southern District of New York had subject matter jurisdiction of this action against us by reason of diversity of citizenship of plaintiff and defendants.

. . .

/s/
DANIEL RHOADES

Sworn to before me this
25th day of November, 1983

/s/

Thomas Lagrotta
Notary Public . . .